No. 87-169

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1987

CHARLES J. SCULLY, HAROLD J. SMITH, WALTER KELLY, EVERETT W. JONES, THOMAS A. COUGHLIN III and HIRSHEL JAFFEE,

*Petitioners,*

– against –

YEVGEN FROMER,

*Respondent.*

**REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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This brief is submitted by petitioners in reply to respondent's brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

### Argument

In his brief in opposition, respondent concedes, as he must, that the rationale of the court of appeals is incompatible with the holdings of this Court in *Turner* v. *Safley*, 107 S. Ct. 2254 (1987) and *O'Lone* v. *Shabazz*, 107 S. Ct. 2400 (1987). Brief in opp. at 2. He nevertheless

contends that this Court should deny certiorari on the grounds that the judgment of the court of appeals is compatible with *Safley* and *Shabazz* and that "further litigation on the subject could produce no benefit to petitioners." *Id.* at 4. Both of these contentions are without merit.

The policies upheld in *Shabazz* furthered interests significantly less critical to the successful operation of a prison than the interests furthered by Directive #4914. They also had a far greater impact upon the exercise of religion than is the case here. In *Shabazz*, the policies were upheld on the basis of the government's interest in preventing congestion and delay at the prison's main gate and simulating the environment prisoners will face when they return to society. Here, the challenged Directive serves interests absolutely essential to the security of a prison: identification of inmates and control of contraband. Further, the policies sustained in *Shabazz* prevented Muslim inmates from engaging in a religious practice which is central to the Muslim faith; here, the court below did not find that the right to grow a beard plays a central role in respondent's practice of his faith.

Referring to the third *Safley/Shabuzz* factor, the impact that accommodation of the constitutional right would have, respondent asserts that there is "no evidence as to specific experience" of the "ripple effect" which would result from abandonment of the Directive. Brief in opp. at 9. Respondent fails to explain how petitioners could obtain such "specific experience" except by repealing the regulation on an experimental basis. No possible reading of *Safley* and *Shabazz* would require such an experiment.

Respondent has appended a stipulation of partial settlement in *Phillips* v. *Coughlin*, 586 F. Supp. 1281 (S.D.N.Y. 1984) to his brief in opposition to the petition. This stipulation appears to be cited by respondent as evidence of DOCS' policy or to render "suspect" the policy

justifications for the beard length regulation at issue here. It is, of course, not evidence of policy. The stipulation expressly provides that it does not constitute a waiver of enforcement of Directive #4914 except as explicitly provided and that it does not act as a bar to the introduction of any supportive evidence or argument in any subsequent litigation. RA-3-RA-4[1]. Furthermore, the waiver of a policy with respect to a sole individual simply does not demonstrate the invalidity of the rationale for the policy generally.

Respondent states that *Ross* v. *Coughlin*, 86 Civ. 1277 (S.D.N.Y. Aug. 3, 1987), a district court decision rendered after *Shabazz*, demonstrates the continued invalidity of the directive under *Safley's* standards. The decision in *Ross*, however, was made on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court merely held that "the standards in *Turner* v. *Safley* applied in this case, *could* afford Ross relief." [Westlaw at p.8] (emphasis supplied). It does not constitute a finding based on a full record (such as the one presented here) that the Directive is invalid under *Safley*.

Contrary to respondent's assertion, respondent's release on parole has not deprived this case of its practical significance. First, although the Second Circuit invalidated the Directive only as to plaintiff, the decision analyzes the validity of the Directive itself. Second, even as to plaintiff himself, the judgment has a significant impact in that it requires the expungement of his records; will prevent the re-imposition of the directive in the event respondent violates his parole; and will have a direct

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[1] RA_ is a reference to the Appendix to the Brief of Respondent in Opposition.

bearing upon plaintiff's claim for damages, Petition at 17a-18a and his motion for $350,000 in attorney's fees. [2]

Respondent claims that a vacatur and remand in this case would be an inappropriate use of this Court's discretionary power of certiorari. He attempts to analogize vacatur on the merits, as sought here, to vacatur for mootness. Respondent claims that this Court appears to have decided "that it need not consider the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review." Brief in opp. at 13. (quoting Stern, Gressman & Shapiro, *Supreme Court Practice*, at 723 (6th ed., 1986)). It is by no means clear, however, that this statement accurately reflects this Court's current practice, *see id.* at 723 n. 28; *Honig* v. *Students of California School For The Blind*, 105 S. Ct. 1820 (1985). *See also*, 13A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure*, § 3533.10 (2d ed. 1985). Even if it were true, the analogy is inapt; respondent concedes that the instant case is not moot and cites no authority to suggest that this Court declines to vacate judgments based on opinions inconsistent with opinions of this Court.

Respondent notes critically that "if there is even a surface inconsistency between the holding below and the new precedent, the Court will generally remand for reconsideration by the lower court." Brief in opp. at 11 (quoting Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5 (1985)). Regardless of the accuracy of this statement or the validity of the criticism, a remand is appropriate in this case, where the court of appeals' application of a concededly erroneous standard is hardly a "surface in-

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[2] Respondent's motion for fees was filed in the district court on July 20, 1987, and is being held in abeyance pending determination of this petition.

consistency." Furthermore, the validity of beard regulations in the prison context is a subject which arises frequently [3] and is worthy of this Court's consideration. Because the courts below did not have the opportunity to rule on that issue using the *Safley* and *Shabazz* standards established by this Court, the cause should be remanded in the first instance to the court of appeals for reconsideration in light of these recent decisions.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Second Circuit vacated, and the case remanded to that court for reconsideration in light of *O'Lone* v. *Shabazz* and *Turner* v. *Safley*.

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[3] Regulations similar to the one at issue here have been upheld by the Eleventh Circuit, *see Maimon* v. *Wainwright*, 792 F.2d 133 (11th Cir. 1986); *Shabazz* v. *Barnauskas*, 790 F.2d 1536 (11th Cir. 1986) by the Third Circuit, *see Wilson* v. *Schillinger*, 761 F.2d 921 (3rd Cir. 1985); *Cole* v. *Flick*, 758 F.2d 124 (3d Cir. 1985), and by the Eighth Circuit, *Hill* v. *Blackwell*, 774 F.2d 338 (8th Cir. 1985). Other district courts have also considered the question. *See, e.g., Moskowitz* v. *Wilkinson*, 432 F. Supp. 947 (D. Conn. 1977); *Monroe* v. *Bombard*, 422 F. Supp. 211 (S.D.N.Y. 1976); *Seale* v. *Manson*, 326 F. Supp. 1375, 1381 (D. Conn. 1971).

Dated: New York, New York
October 9, 1987

Respectfully submitted,

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